STATE OF MICHIGAN

COURT OF APPEALS

Estate of JEANETTE BROOKSHIRE, by its Personal Representative, RANDALL D. BROOKSHIRE,

Plaintiff-Appellee,

v

NANCYLEE STIER, M.D., and ANN ARBOR INPATIENT PHYSICIANS, P.L.L.C.,

Defendants-Appellants,

and

BHARTIBEN PATEL, M.D., PATEL INTERNAL MEDICINE ASSOCIATES, P.C., KELLY MANDAGERE, M.D., ANN ARBOR ENDOCRINOLOGY AND DIABETES ASSOCIATES, P.C., ROBERT URBANIC, M.D., TRINITY HEALTH-MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL, f/k/a MERCY HEALTH SERVICES,

Defendants.

UNPUBLISHED
March 24, 2011

No. 291186
Washtenaw Circuit Court
LC No. 03-000731-NH

Estate of JEANETTE BROOKSHIRE, by its Personal Representative, JEFFREY BROOKSHIRE,

Plaintiff-Appellee,

v

BHARTIBEN PATEL, M.D., PATEL INTERNAL MEDICINE ASSOCIATES, P.C., KELLY MANDAGERE, M.D., and ANN ARBOR ENDOCRINOLOGY AND DIABETES ASSOCIATES, P.C.,

No. 292991
Washtenaw Circuit Court
LC No. 03-000731-NH

Defendants-Appellants,

and

NANCYLEE STIER, M.D., ANN ARBOR INPATIENT PHYSICIANS, P.L.L.C., ROBERT URBANIC, M.D., and TRINITY HEALTH MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL, f/k/a MERCY HEALTH SERVICES,

Defendants.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

In Docket No. 291186, defendants Nancylee Stier, M.D., and Ann Arbor Inpatient Physicians, P.L.L.C. (hereafter referred to individually by name or collectively as the "Stier defendants"), appeal as of right from a judgment, following a jury trial, awarding plaintiff $620,000 in this wrongful death medical malpractice action.[1] A judgment of no cause of action was entered in favor of four other defendants, Bhartiben Patel, M.D., Patel Internal Medicine Associates, P.C., Kelly Mandagere, M.D., and Ann Arbor Endocrinology and Diabetics Associates, P.C. (hereafter referred to individually by name or collectively as the "Patel and Mandagere defendants"). In Docket No. 292991, the Patel and Mandagere defendants appeal as of right from the trial court's order denying their motion for taxable costs. We affirm in part, reverse in part, and remand for further proceedings in Docket No. 291186, and we reverse and remand for further proceedings in Docket No. 292991.[2]

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[1] The jury awarded damages of $650,000, but the trial court reduced the jury's verdict by $30,000 to reflect a set off for plaintiff's settlements with two other defendants, Robert Urbanic, M.D., and Trinity Health-Michigan, d/b/a St. Joseph Mercy Hospital, f/k/a Mercy Health Services.

[2] In a prior appeal, this Court upheld the trial court's denial of defendants' motions for summary disposition based on the statute of limitations, *Brookshire v Patel*, unpublished opinion per curiam of the Court of Appeals issued March 15, 2007 (Docket Nos. 257214; 257629). However, our Supreme Court subsequently reversed this Court's decision, reinstated the trial court's order denying defendants' motions, and "remanded the case for further proceedings not inconsistent with this order and the order in *Mullins* [*v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007)]." *Brookshire v Patel*, 480 Mich 980; 741 NW2d 842 (2007).

I. BACKGROUND

On October 16, 2000, the decedent, Jeanette Brookshire, died from complications from a form of lymphoma, which generally involves cancer of the lymph node system. The decedent's primary care physician in 2000 was Dr. Patel, an internal medicine physician, but she was also referred to Dr. Mandagere, an endocrinologist, for evaluations. Blood testing in 2000 showed that the decedent was anemic. Both a CT scan in May 2000 and an MRI (magnetic resonance imaging) in June 2000 showed an abnormality in the adrenal glands, but the cause was not determined.

On October 5, 2000, the decedent's husband took the decedent to Saline Community Hospital, where she was admitted for a brief period of time and evaluated by Dr. Mary O'Rourke. The decedent was extremely dehydrated and had other symptoms indicative of an adrenal crisis. According to hospital records, Dr. O'Rourke was concerned that the decedent could have a malignancy, such as aggressive lymphoma or a hepatic malignancy. Later on October 5, the decedent was transferred to St. Joseph Mercy Hospital. Dr. Stier, an internal medicine physician, was the decedent's treating physician at St. Joseph Hospital until the decedent's discharge on October 10, 2000, but Dr. Stier also consulted other physicians. The decedent was given a blood transfusion to address low blood counts and fluids to address dehydration. The decedent also received steroids to address her adrenal insufficiency, but no biopsies or other diagnostic tests for cancer were ordered. When the decedent was discharged from the hospital, Dr. Stier gave her a prescription for steroids, but at a lower level then when she was first hospitalized, and directed her to schedule a CT scan. The decedent was also given a "prescription" to get a biopsy.

On October 13, 2000, after collapsing at home, the decedent was again admitted at St. Joseph Mercy Hospital. She had bleeding in her abdominal cavity and died on October 16, 2000. Dr. Badin Cassin, the Washtenaw County Medical Examiner, performed an autopsy of the decedent and took tissue biopsies. He concluded that the decedent suffered from non-Hodgkin's lymphoma, and that the lymphocyte cell type was probably a B-cell. In addition to the lymph nodes, tumors had infiltrated her heart, lungs, liver, spleen, and possibly other organs and the small intestine.

II. DOCKET NO. 291186

The Stier defendants first challenge the trial court's denial of their motion for judgment notwithstanding the verdict ("JNOV"). The Stier defendants argue that plaintiff's malpractice action should be treated as a lost opportunity to survive action under MCL 600.2912a(2), but that even if it is treated as a traditional negligence action, plaintiff failed to prove that Dr. Stier's alleged negligence was a proximate cause of the decedent's injuries that resulted in her death.

A motion for JNOV, like a motion for a directed verdict, essentially challenges the sufficiency of the evidence in a civil case. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). This Court reviews a trial court's denial of a motion for JNOV de novo, examining the evidence and all legitimate inferences in a light most favorable to the nonmoving party. *Id*. "If reasonable persons, after reviewing the evidence in a light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury." *Id*. at 500.

We first address the Stier defendants' claim that this case should be treated as a lost-opportunity claim. MCL 600.2912a(2) provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

In *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485; 853 NW2d 2010, our Supreme Court addressed the burden of proof necessary to establish proximate causation under the first sentence in MCL 600.2912a(2). Justice Hathaway, with the concurrence of Justice Weaver, determined that the first sentence of MCL 600.2912a(2) reiterates the traditional rule for proximate causation. *Id*., slip op at 8-9, 11 (opinion of HATHAWAY, J.). As such, the plaintiff must show both that the negligent conduct was a cause in fact of the injury and legal causation. *Id*. at 9. The alleged conduct must be "a proximate cause," not "the proximate cause" of the injury. *Id.* at 10. Justice Hathaway determined that this Court's prior decision in *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), should be overruled to the extent that it applied the second sentence in MCL 600.2912a(2) to a traditional malpractice claim. *Id*. at 11-12, 19. Justice Cavanagh, joined by Chief Justice Kelly, concurred in the result, stating:

> I agree with the majority that the Court of Appeals' judgment in this case should be reversed because the Court erred by treating this case as a loss-of-opportunity case instead of a traditional medical malpractice case and, as a result, erred by requiring plaintiff to meet the requirements in the second sentence of MCL 600.2912a(2). I further agree that *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), should be overruled to the extent that courts have relied on it to improperly transform what could be traditional medical malpractice claims into loss-of-opportunity claims. [*Id*., slip op at 1 (CAVANAGH, J., concurring).]

Plurality opinions in which no majority of the justices agree on the reasoning are not an authoritative interpretation or binding on courts under the rule of stare decisis. *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976); *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 567; 766 NW2d 896 (2009). But because a majority of the justices in *O'Neal* agreed that a plaintiff may pursue a traditional malpractice claim, separate and distinct from a lost-opportunity claim, we reject the Stier defendants' argument that plaintiff's claim against Dr. Stier should be treated as a lost-opportunity claim. Although the record shows that plaintiff was unable to avoid a jury instruction that precluded recovery for a "loss of opportunity to survive unless the plaintiff proves that the decedent's chance of survival fell more than fifty percentage points as a result of the professional negligence," because plaintiff did not plead a lost-opportunity claim in her

complaint or attempt to present such a claim at trial, we conclude that the lost-opportunity provision in MCL 600.2912a(2) does not apply.[3] *Taylor*, 286 Mich App at 509-510.

We now turn to the Stier defendants' challenge to the sufficiency of the evidence regarding proximate causation. We disagree with the Stier defendants' argument that the alleged professional negligence must be viewed solely as Dr. Stier's failure to order an adrenal biopsy on October 10, 2000. Although failure to order an adrenal biopsy was part of the professional negligence identified by plaintiff's standard-of-care expert, Dr. Steven Fugaro, Dr. Fugaro also opined that Dr. Stier did not adequately stabilize the decedent and that diagnostic testing, including repeat scans and adrenal and bone marrow biopsies, should have been performed before the decedent's discharge from the hospital and pursued as a matter of urgency. Dr. Fugaro opined that the decedent's high LDH (lactate dehydrogenase) enzyme level, which is often elevated in individuals suffering from lymphoma, would have suggested to any internal medicine physician that there was a need to act quickly to make a diagnosis and that Dr. Stier had the "overall responsibility as the responsible and coordinating attending physician to get these tests done and to make that diagnosis which would have been very easy in those five days." He opined that, while there was evidence that Dr. Stier deferred to a hematologist, Dr. Andrew Eisenberg, in deciding not to request a bone marrow biopsy, "this is a clear example of where you have to say to your consultant you know I'm sorry I want you to do a bone marrow biopsy."

Other witnesses, including plaintiff's causation expert, Dr. Barry Singer, indicated that physicians have the authority to request biopsy results on a "stat" or urgent basis, rather than waiting the normal period for the results. And while Dr. Stier testified that she could not order a bone marrow biopsy, she also testified that she never requested one from Dr. Eisenberg. Further, she testified that she notified her partner, Dr. Perrotta, that she had a patient who might need a bone marrow biopsy, but that she never called on him to do a biopsy based on Dr. Eisenberg's recommendation.

Viewing the evidence in a light most favorable to plaintiff, reasonable persons could find that Dr. Stier, acting with the urgency demanded by the decedent's condition, had the ability to make the lymphoma diagnosis during the decedent's five-day hospital stay. Viewing the Stier defendants' challenge to the sufficiency of evidence regarding causation in this context, we are not persuaded that the trial court erred in denying the motion for JNOV. The cause-in-fact aspect of proximate causation generally requires "substantial evidence from which a jury may conclude that it is more likely than not that, but for the defendant's conduct, the plaintiff's injury would not have occurred." *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009).

Plaintiff's causation expert, Dr. Singer, opined at trial that the decedent would be considered a "stage four" patient because she had widespread lymphoma, but that this did not change the prognosis for her in terms of responding to chemotherapy treatment referred to as

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[3] At oral arguments in this matter, defense counsel for the Stier defendants recognized that the failure to plead a lost-opportunity cause of action precludes consideration of such a claim. Defense counsel stipulated that a lost opportunity cause of action was not pleaded.

"CHOP." Dr. Singer repeatedly expressed his prognosis for the decedent, with treatment, using a 70 percent overall cure rate, meaning that a person would live for five years without a reoccurrence, or "if they have a recurrence within those five years at the end of the five years, they don't have disease." He gave weight to the decedent's response to steroids that were used to treat her adrenal insufficiency and, in particular, the effect on the decedent's LDH level, to support his opinion that the decedent would fall within the 70 percent cure rate if her treatment began before she suffered a terminal event involving a massive increase in the lymphoma and related complicated. For instance, he testified:

> *Q*. Had she been diagnosed and treated by the time of at least her discharge on October the 10th because we know that's when she was sent home, her outcome?
>
> *A*. Assuming she wasn't discharged but diagnosed and treated during that time and continued on the steroids and given CHOP again cure at seventy percent.
>
> *Q*. And the implementation of that treatment could have occurred beyond October the 10th had she been supported at the hospital?
>
> *A*. On [sic] sure. Because she was doing – again she was doing reasonably well. The falling of the LDH you know that lymphoma is responding to one of the four drugs that we normally use to treat it. So in my mind there would be no question that she, she was responding already to what we call partial chemotherapy.

Even Dr. Samuel Silver, a hematologist and oncologist who was called as an expert witness by the Mandagere defendants, testified that most people with large B-cell non-Hodgkin's lymphoma respond to treatment in some fashion, although, like Dr. Singer, he indicated that the decedent had an explosive growth of her lymphoma before she died.

Although we note that our Supreme Court recently upheld a trial court's exclusion of Dr. Singer's expert testimony in a case involving a plaintiff suffering from sickle cell anemia, on the ground that it did not satisfy the reliability standards for MRE 702, see *Edry v Aldelman*, 486 Mich 634; 786 NW2d 567 (2010), the Stier defendants in this case have not shown, let alone argued, that they timely moved to exclude Dr. Singer's testimony. The Stier defendants only argue that Dr. Singer gave unreliable expert testimony to support their claim that the trial court erred in denying their motion for JNOV.

As part of the trial court's gate keeping function with respect to the admissibility of expert testimony under MRE 702, a trial court has the obligation to ensure that every aspect of an expert's testimony is reliable before admitting the testimony. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-782; 685 NW2d 391 (2004). The proponent of expert testimony in a medical malpractice case must also establish that the expert is qualified under MCL 600.2955 and MCL 600.2169. See *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067; 729 NW2d 221 (2007). An evidentiary hearing is an appropriate means for a trial court to filter out unreliable expert testimony. *Chapin v A L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007).

But to properly preserve an evidentiary issue, a party must timely object or move to strike the evidence, stating the specific ground for objection. MRE 103(a)(1). However, a court may take notice of plain evidentiary errors affecting substantial rights. MRE 103(d). In general, this Court "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

Because the Stier defendants have not shown that they properly and timely preserved a challenge to the admissibility of Dr. Singer's testimony, we review their present challenge to the reliability of the testimony for plain error. MRE 103(d). Considering that plaintiff was never given an opportunity at an evidentiary hearing to demonstrate the reliability of Dr. Singer's opinion through literature or other means, we conclude that no plain error has been shown. Viewing Dr. Singer's testimony and the other proofs in a light most favorable to plaintiff, the Stier defendants were not entitled to JNOV. Reasonable persons could honestly reach different conclusion as to whether Dr. Stier's professional negligence was a proximate cause of the terminal event suffered by the decedent, which led to her death. *Taylor*, 286 Mich App at 500. Stated otherwise, plaintiff proved that Dr. Stier's negligence more probably than not was the cause the decedent's injury. *O'Neal*, slip op at 20 (opinion of JUSTICE HATHAWAY).

The Stier defendants next argue that the trial court erred by not reducing the jury's verdict to the lower cap for damages in MCL 600.1483. We agree.

Under MCL 600.6098(1), the trial court was required to set aside any noneconomic damages in excess of the amount specified in MCL 600.1483. In applying the latter statute, a court applies the statutory cap, if at all, at the time the judgment is entered. *Dawe v Dr Reuvan Bar-Levav & Assoc, PC (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 269147, issued August 12, 2010), slip op at 15; *Velez v Tuma*, 283 Mich App 396, 401; 770 NW2d 89 (2009). The trial court, not the jury, serves as the finder of fact in determining whether the unique damages necessary to apply the higher cap exist. *Shivers v Schmiege*, 285 Mich App 636, 646; 776 NW2d 669 (2009).

To justify application of the higher cap in this case, it was necessary that the decedent have "permanently impaired cognitive capacity rendering . . . her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living." MCL 600.1483(1)(b). Death itself is not a qualifying injury. *Young v Nandi*, 276 Mich App 67, 80; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008). "[T]o establish this qualifying injury the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent 'rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.'" and "this permanently impaired cognitive capacity must be 'the result of the negligence of 1 or more of the defendants . . . .'" *Id*. at 80, quoting MCL 600.1483(1)(b).

In *Young*, 276 Mich App at 80-81, this Court rejected the notion that impairments suffered by an individual in the course of his or her decline to death can satisfy the statute, at least in these circumstances where there is no evidence to suggest that the individual would have suffered the impairment if he of she had lived. The decedent in *Young* died because she was not

properly diagnosed and treated for intestinal ischemia. *Id.* at 70. In remanding the case for imposition of the lower cap for noneconomic damages, this Court stated:

> Plaintiff argues on appeal that because Young was on a ventilator and medically sedated, she suffered the requisite impaired cognitive capacity. Plaintiff also appears to argue that, during the course of her decline, Young was not able to make medical decisions on her own behalf, which was evidence of her impaired cognitive capacity. Neither of these arguments tends to establish that Young suffered permanently impaired cognitive capacity within the contemplation of the statute. But for her clinical decline and the associated or necessary medical interventions, the evidence did not suggest that Young suffered damage to or diminishment of her mental ability to perceive, memorize, judge, or reason that was expected to be permanent. For example, there was no evidence to suggest that, if Young had lived, she would have been incapable of making independent, responsible life decisions and that she would have been permanently incapable of performing the activities of normal, daily living. That she may have temporarily or unnaturally experienced impaired cognitive capacity at some point before her death does not establish entitlement to the higher noneconomic damages cap. Therefore, we reverse the trial court's award that was based on this higher cap and remand the matter for the purpose of imposing the lower cap on the noneconomic damage award pursuant to MCL 600.1483(1). [*Young*, 276 Mich App at 80-81.]

Here, the qualifying injury claimed by plaintiff was the decedent's development of DIC (disseminated intravascular coagulation) and related bleeding before her death that, based on plaintiff's evidence, was a consequence of the untreated lymphoma. Although the trial court failed to make any specific findings to support its application of the higher cap, we agree with the Stier defendants' argument that the evidence did not support the higher cap. Clearly, there was evidence that the decedent had impaired cognitive capacity that resulted from the bleeding. Dr. Cassin opined that even persons with "grossly normal brains" can have impaired functioning. Both Dr. Cassin and Dr. Singer testified that a person's cognitive functioning would be affected by a lack of blood flow to the brain. Further, there was testimony by lay witnesses that the decedent lost the ability to communicate before her death.

But the only evidence that the impairment became permanent is the evidence that the decedent died. The evidence indicated that the decedent went into cardiopulmonary arrest before she died. Dr. Cassin testified that a resuscitative process is clinically applied to a person who is in arrest and, if the process is unsuccessful, the person is pronounced dead. He did not recall finding any evidence of a brain injury when performing the autopsy. Dr. Singer was specifically asked to address the bleeding sustained by the decedent in the context of the statutory requirement of a permanent injury, but indicated only that it "very well could" have rendered her permanently impaired from making responsible life decisions before her death.

The most that can be said from the evidence is that the decedent had an impaired cognitive capacity before her death. Neither Dr. Singer's speculation that it "could" have become permanent, nor Dr. Cassin's testimony regarding how a person in cardiopulmonary arrest progresses towards death when the resuscitative process is unsuccessful establishes the required permanent impaired cognitive capacity. Because the qualifying injury must occur before death (regardless of when death might be formally declared by a doctor) and permanency

is part of the qualifying injury, the trial court erred in imposing the higher cap. Therefore, we reverse the award based on the higher cap and remand this case to the trial court for imposition of the lower cap for noneconomic damages under MCL 600.1483(1).

The Stier defendants next seek a new trial on the basis of two irregularities that allegedly deprived them of a fair trial. Given the Stier defendants' reliance on MCR 2.611(A) in their argument, we consider this claim as a challenge to the trial court's denial of their motion for a new trial.

A trial court's grant or denial of a motion for a new trial under MCR 2.611(A) is reviewed for an abuse of discretion. *Gilbert*, 470 Mich at 761. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Because the trial court relied on prior rulings to matters raised by the Stier defendants as the basis for its decision to deny the motion for a new trial, it is necessary to consider the trial court's prior rulings. Examined in this context, the Stier defendants have not established any basis for disturbing the trial court's denial of their motion for a new trial based on the alleged improper jury instruction and plaintiff's notice of intent to file a claim ("NOI").

The trial court gave a jury instruction that explained the delay in this case attributable to the prior appeal and the stay that was in place during the appeal process. A trial court's instructions on matters not governed by model instructions must be unslanted. MCR 2.516(D)(4). Even where instructions are somewhat imperfect, however, "instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Instructional error warrants reversal if it is so unfairly prejudicial to the objecting party that the failure to vacate the verdict would be inconsistent with substantial justice. *Ward v Consol Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005); see also MCR 2.613(A), and *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

The record discloses that the jury instruction was prompted by remarks made by attorneys during trial concerning the delay in bringing this case to trial. The Stier defendants have failed to show that the instruction was an unfair response to the remarks. Contrary to what the Stier defendants assert, the instruction does not suggest that any defendant was playing games or pushed a nonmeritorious position during the prior appeal proceedings. Further, considering that the jury found that Drs. Patel and Mandagere were not negligent, it is apparent that the instruction did not improperly influence the jury against the defendants. Dr. Stier cannot show prejudice. There is no basis for disturbing the trial court's denial of a new trial on this ground.

With respect to the Stier defendants' claim based on the NOI that plaintiff provided before filing the malpractice action pursuant to MCL 600.2912b, we note that any defect or error in the NOI is subject to MCL 600.2301, which provides that "[t]he court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." See *DeCosta v Gossage*, 486 Mich 116, 124; 782 NW2d 734 (2010), and *Bush v Shabahang*, 484 Mich 156, 177; 772 NW2d 272 (2009). Although the Stier defendants argue on appeal that they were surprised by plaintiff's presentation of liability theories that allegedly were not identified in the NOI, they have not identified any specific

objection on this basis at trial or provided any supporting citations to the record. "A party may not leave it to this Court to search for the factual basis to sustain or reject its position, but must support its position with specific references to the record." *Begin v Michigan Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009); see also MCR 7.212(C)(7). Therefore, we consider this issue abandoned and decline to consider it further. *Id.* The Stier defendants have not substantiated their position that the trial court should have ordered a new trial on this ground.

Finally, the Stier defendants challenge the amount of taxable costs and case evaluation sanctions under MCR 2.403, which the trial court awarded following the entry of the judgment. We conclude that this Court lacks jurisdiction to consider this issue.

> "The question of jurisdiction is always within the scope of this Court's review . . . ." *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004). This Court has jurisdiction of an appeal as of right filed by an aggrieved party from a "final judgment or final order . . . ." MCR 7.203(A)(1). MCR 7.202(6)(a)(I) and (iv) defines "final judgment" or "final order" in a civil case as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties," or "a post-judgment order awarding or denying attorney fees and costs . . . ." An appeal as of right must be filed within "21 days after entry of the judgment or order appealed from[.]" MCR 7.204(A)(1)(a). The filing of the claim of appeal and the entry fee vests this Court with jurisdiction in an appeal as of right. MCR 7.204(B)(1) and (2). [*McIntosh v McIntosh*, 282 Mich App 471, 483-484; 768 NW2d 325 (2009).]

The first judgment that disposed of all of plaintiff's malpractice claims was entered on December 17, 2008. The Stier defendants timely filed a postjudgment motion for JNOV or a new trial, which thereby allowed them to wait until after the trial court decided the motion before filing a claim of appeal. MCR 7.204(1)(b). The postjudgment motion was decided on March 6, 2009, but the March 6 order was not itself the final judgment; it merely extended the time in which plaintiff could file a claim of appeal from the December 17, 2008, final judgment. More importantly, the separate March 6, 2009, order awarding plaintiff costs and case evaluation sanctions was a postjudgment order from which the Stier defendants were required to file a separate appeal. *McIntosh*, 282 Mich App at 484; see also *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 165-166; 712 NW2d 731 (2005) (to constitute an appealable final order, the amount of attorney fees and costs to be awarded must be determined). Because the Stier defendants failed to file a separate claim of appeal from the March 6, 2009, order awarding attorney fees and costs, this Court lacks jurisdiction to consider the Stier defendants' challenge to that order.

III. DOCKET NO. 292991

The Patel and Mandagere defendants challenge the trial court's June 22, 2009, order denying their motion for taxable costs under MCR 2.625. They argue that the trial court erroneously relied on the case evaluation rule, MCR 2.403(O), to conclude that taxable costs could not be awarded under MCR 2.625. We agree.

We review a trial court's interpretation and application of a court rule de novo as a question of law, applying principles of statutory construction. *Henry v Dow Chem Co*, 484 Mich

483, 495; 772 NW2d 301 (2009). "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Haliw v City of Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). In determining the meaning of a court rule, a court begins with the plain language of the court rule. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). An unambiguous rule must be applied as written. *Id.* at 628; see also *Peterson v Fertel*, 283 Mich App 232, 236; 770 NW2d 47 (2009). A provision is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39-40; 761 NW2d 269 (2008).

MCR 2.403 and MCR 2.625 both provide a potential means for a party to recover taxable costs, but they are subject to different procedural requirements. *Badiee v Brighton Area Sch*, 265 Mich App 343, 375-376; 695 NW2d 521 (2005). Because the Patel and Mandagere defendants brought their motion under MCR 2.625, we shall first consider that rule. This court rule does not reward a prevailing party or punish a losing party, but rather constitutes a litigation burden, which is presumably known by the affected party. *Mason v City of Menominee*, 282 Mich App 525, 530; 766 NW2d 888 (2009). MCR 2.625 provides in relevant part:

> (A). Right to Costs.
>
> (1) In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.
>
> * * *
>
> (B) Rules for Determining Prevailing Party.
>
> * * *
>
> (2) Actions With Several Issues or Counts. In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.
>
> (3) Actions With Several Defendants. If there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants.

It is undisputed that the Patel and Mandagere defendants are prevailing parties under the plain language of MCR 2.625(B)(3), because judgments of no cause of action were entered in their favor on December 17, 2008. In fact, the trial court stated in its written opinion that "the taxation of costs in favor of these defendants would be warranted" under MCR 2.625(B)(3). Thus, looking solely to MCR 2.625, taxable costs should have been allowed unless, pursuant to MCR 2.625(A)(1), the costs were prohibited by statute, rule, or the trial court directed otherwise

for reasons stated in writing. See also *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 521; 556 NW2d 528 (1996).

MCR 2.403(O), on which the trial court relied to prohibit taxable costs under MCR 2.625, establishes liability for case evaluation sanctions for the purpose of shifting the financial burden of a trial onto a party who insists on a trial by rejecting a case evaluation award. *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006). Case evaluation sanctions are not intended to punish a party, but rather to foster settlement. *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002). The court rule provides, in part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's *actual costs* unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to *costs* only if the verdict is more favorable to that party than the evaluation.
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> * * *
>
> (4) In cases involving multiple parties, the following rules apply:
>
> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, *costs* may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.
>
> (b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover *costs* unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover *costs* unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.
>
> * * *
>
> (6) For the purpose of this rule, *actual costs* are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.
>
> For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party. [MCR 2.403(O) (emphasis added).]

Here, there is no dispute that neither plaintiff nor any of the relevant defendants, when evaluated under the "particular pair" standard in the first sentence of MCR 2.403(O)(4)(a) and

the requirements of MCR 2.403(O)(1), are entitled to case evaluation sanctions. MCR 2.403(O)(4)(a), as a whole, protects a party's right to reject a case evaluation, while at the same time fairly burdening that decision with enough risk to ensure a well-reasoned decision. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 525; 664 NW2d 263 (2003). "[S]eparately considering the case between each particular pair of parties equitably accomplishes the objective of MCR 2.403(O) to expedite the resolution of cases by only imposing sanctions when they are justified." *Id*.

We disagree with the trial court's determination that the second sentence in MCR 2.403(O)(4)(a) prohibits an award of taxable costs under MCR 2.625, where the aggregate standard is satisfied, because the word "costs" is not expressly modified by the word "actual." This Court addressed a similar issue in *Zalut v Andersen & Assoc, Inc*, 186 Mich App 229, 232; 463 NW2d 236 (1990), when considering the consequences of the failure to modify the word "costs" in the second sentence of MCR 2.403(O)(1). In rejecting a claim that only "normal" costs should be allowed, this Court stated:

> There is nothing in the history of MCR 2.403(O) which supports the interpretation urged by plaintiffs. The change advocated by plaintiffs is a dramatic change and there is nothing in the published history of the rule to indicate that the failure to include the word "actual" in the last sentence of MCR 2.403(O)(1) was intended to make such a monumental change in the rule. Specifically, neither the staff comments nor the authors' comment in the leading text on the Michigan Court Rules make any reference to the interpretation advocated by plaintiffs. See 2 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.403, pp 432-434, 447. Finally, an examination of the wording of MCR 2.403(O)(1) demonstrates that plaintiffs' interpretation is incorrect. The first sentence of the rule standing alone would govern this case because it directs the award of "actual costs" whenever a party rejects the evaluation "unless the verdict is more favorable to the rejecting party than the mediation evaluation." That is what occurred in this case. The next sentence of the rule refers to the situation of the opposing party also rejecting the panel's evaluation and begins with the word "However." This appears to modify the first sentence and could not have been intended to exempt from the operation of the rule all cases in which both parties reject the mediation panel's evaluation. [*Zalut*, 186 Mich App at 233-234.]

Similarly, in this case, the word "However" in MCR 2.403(O)(4)(a) is properly understood as modifying the first sentence. It provides a means for a plaintiff to avoid liability for case evaluation sanctions that would otherwise be payable by the plaintiff, when the case is evaluated under the "particular pair" standard in the first sentence. Examined in context, the word "costs" was plainly intended to refer to the actual costs payable as case evaluation sanctions. Therefore, the trial court erred as a matter of law in holding that the second sentence of MCR 2.403(O)(4) prohibits the taxation of costs under MCR 2.625.

We find nothing in MCR 2.403(O) that prohibits the taxable costs at issue in this case. At most, the definition of "actual costs" in MCR 2.403(O)(6) contains a provision for determining the prevailing party under MCR 2.625 for purposes of taxable costs. Because

neither plaintiff nor any of the Patel and Mandagere defendants are entitled to case evaluation sanctions, MCR 2.403(O)(6) does not apply.

Contrary to plaintiff's argument on appeal, this Court's decision in *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57; 577 NW2d 150 (1998), does not support a conclusion that taxable costs are precluded under the circumstances of this case. The plaintiff in that case sought to be treated as a prevailing party under MCR 2.625(B)(2) because it prevailed in the sense that it recovered a money judgment, even though the defendant was entitled to mediation sanctions. *Id*. at 80-81. Applying MCR 2.403(O)(6) to these parties, this Court "read MCR 2.625(B)(2) and MCR 2.403(O)(6) together to conclude that the party entitled to actual costs under the mediation rule for a cause of action shall also be deemed the prevailing party under MCR 2.625(B)(2) on the entire record." *Id*. at 81. Stated otherwise, the defendant was treated as the party who prevailed on the entire record.

The reasoning in *Forest City Enterprises* is inapplicable to this case because, unlike this case, the particular pair of parties disputing costs in *Forest City Enterprises* included a party entitled to mediation sanctions. In this circumstance, it was reasonable to apply MCR 2.403(O)(6) in a manner that reached a harmonious result with the "on the entire record" standard in MCR 2.625(B)(2). Nothing in *Forest City Enterprises* suggests that a party could rely on an entitlement to case evaluation sanctions against another party under MCR 2.403 to avoid paying taxable costs to a different party under MCR 2.625.

Plaintiff's reliance on *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349; 737 NW2d 807 (2007), and *Brown v Gainey Transp Servs, Inc*, 256 Mich App 380; 663 NW2d 519 (2003), is similarly misplaced. Those cases both involved a plaintiff who was attempting to recover taxable costs from a defendant who was entitled to case evaluation sanctions. Because the present case involves multiple defendants, and plaintiff is not entitled to case evaluation sanctions against any of the Patel or Mandagere defendants, the trial court's denial of their motion for taxable costs under MCR 2.625 was based on an error of law. Therefore, we reverse the order denying the Patel or Mandagere defendants' motion for taxable costs and remand this case to the trial court for consideration of the motion solely under MCR 2.625.

In Docket No. 291186, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. In Docket No. 292991, we reverse the denial of taxable costs to the Patel and Mandagere defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Henry William Saad